Marquis Aurbach Coffing
CRAIG R. ANDERSON, ESQ.
Nevada Bar No. 6882
JOSHUA L. BENSON, ESQ.
Nevada Bar No. 10514
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
canderson@maclaw.com
jbenson@maclaw.com
Attorneys for Defendant LVMPD

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PETRA CARRILLO, individually, as Special Administratrix of the Estate of IVAN CARRILLO, and as the parent and natural guardian of ARLEEN CARRILLO, AYLEEN CARRILLO, AND JAYLEEN CARRILLO,

Plaintiffs,

vs.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT; OFFICER A. CARPENTER, in his individual and official capacity; OFFICER A. UBBENS, in his individual and official capacity; DOES 1 through 10, inclusive; and ROE ENTITIES 11 through 20, inclusive,

Defendants.

ROXANA CORREA, BRIANNA LATISHA CARRILLO and IVAN ANTHOANE CARRILLO, Plaintiffs, by their Parent and Legal Guardian, ROXANA CORREA,

Plaintiffs,

vs.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, OFFICER ARON SAMUEL CARPENTER, in his individual and official capacity, OFFICER ANDREW CHARLES UBBENS, in his individual and official capacity, DOES 1 through 10, inclusive, ROE ENTITIES 11 through 20, and ROE SURETY COMPANY,

Defendants.

Case No.: 2:10-cv-02122-KJD-GWF

Hearing Date: **January 29, 2013**
Hearing Time: **10:30 a.m.**

DEFENDANT LAS VEGAS METROPOLITAN POLICE DEPARTMENT'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL AND TO EXTEND DISCOVERY PERIOD

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Defendant Las Vegas Metropolitan Police Department ("LVMPD"), by and through their attorneys of record, Marquis Aurbach Coffing, hereby file their Opposition to Plaintiffs' Motion to Compel and to Extend Discovery Period [Court Dkt. #84]. This Opposition is made and based upon the attached Memorandum of Points & Authorities, the pleadings and papers on file herein, and any oral argument allowed by the Court at a hearing on this matter.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION.

Fifteen months ago, the Las Vegas Metropolitan Police Department asserted a privilege over its Internal Affairs files ("IA file") and Aron Carpenter's personnel file. Now, three months after discovery closed, Petra Carrillo ("Carrillo") seeks to compel production of LVMPD's IA file. The federal circuits, including the District of Nevada, protect internal affairs documents from disclosure to ensure governmental self-evaluation and consequent program improvement is not chilled.[1] In asserting the privilege, LVMPD balanced the need to keep its IA file confidential with Carrillo's need to prosecute the case. Thus, LVMPD disclosed its comprehensive 80-page investigation report, officer interview transcripts, witness interview transcripts, voluntary statements, accident diagrams, photographs, the names of all officers involved, toxicology records, 911 recordings, and radio traffic between officers. But it was necessary for LVMPD to assert a privilege over its IA file, which include LVMPD findings, comments and recommendations surrounding officer discipline.

Also, *three months after discovery closed*, Carrillo seeks to compel three LVMPD employees to attend a deposition without a subpoena. It is fundamental in civil practice that a nonparty deponent can only be compelled to attend a deposition by subpoena. While a "managing agent" of a defendant company need not be compelled, it is plaintiff's burden to demonstrate that the employee is a managing agent. Here, Carrillo neither subpoenaed the witnesses nor provided evidence that the witnesses are "managing agents" of LVMPD. In fact, the officers are not managing agents and were required to be subpoenaed. Also, Carrillo is

[1] Segura v. City of Reno, 116 F.R.D. 42, 45 (D.Nev. 1987).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

attempting to go around this Court's previous denial for more discovery. On September 14, 2012, before Carrillo noticed these depositions, this Court limited discovery. But Carrillo ignored that order. Thus, LVMPD respectfully requests that Carrillo's motion to compel be denied.

II. STATEMENT OF FACTS.

Plaintiffs brought a 42 U.S.C. § 1983 action and wrongful death claim alleging that Officer Carpenter used excessive force on Ivan Carrillo after Ivan refused to pull over when police attempted to stop Ivan for driving while intoxicated. Since the Complaint was filed in December 2010, Plaintiffs received *four* separate extensions of the discovery deadlines on April 6, 2011, June 23, 2011, September 30, 2011 and January 19, 2012. On September 14, 2012, this Court denied Carrillo's request to extend the discovery deadlines, but allowed Carrillo to conduct five depositions—three expert depositions, a LVMPD 30(b)(6) deposition and the deposition of Aron Carpenter.

A. THE ACCIDENT.[2]

At approximately 10:09 p.m., a citizen, Ashley Green, reported an impaired driver in the area of Carey Avenue and Lamb Boulevard. Ms. Green said a small, black vehicle was driving very slowly and weaving between the travel lanes. Officer Anthony Lourenco found the suspected impaired driver and attempted to conduct a traffic stop on the vehicle. The impaired driver, later identified as Ivan Carrillo, refused to stop, and continued to drive in a slow manner until he reached Nellis Boulevard, where the driver increased speed. Officer Lourenco requested additional marked patrol units to assist in stopping the Honda. Once additional units arrived, Officer Lourenco broke off contact with the Honda.

When Officers Aron Carpenter and Andrew Ubbens, in separate marked black and white patrol units, attempted to stop Ivan, he refused and continued northbound on Nellis Boulevard. Ivan continued to drive in an erratic manner westbound on Craig Road. Still being followed by

[2] See Accident Investigation Supplement, attached as **Exhibit A**.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Officers Carpenter and Ubbens, Ivan turned northbound on Lamb Boulevard and *continued north in the southbound travel lanes*.

As Ivan reached the intersection of Lamb Boulevard and Lone Mountain Road, Ivan lost control of his vehicle and Ivan crossed into the southbound travel lanes. A Ford Contour, driven by Andrea Hottel, and a Dodge Ram 1500, driven by Dennis Wallace, collided with the Honda. Ivan and Andrea Hottel were transported to UMC where Carrillo was pronounced dead shortly after arrival.

B. DISCOVERY PROCEDURAL HISTORY.

Once discovery began, LVMPD disclosed all facts surrounding its investigation. First, LVMPD disclosed its comprehensive 80-page Accident Investigation—despite its confidential nature.[3] Additionally, LVMPD disclosed scale diagrams, training materials, policies, Aron Carpenter's training, interview transcripts of witnesses and officers, voluntary statements, pictures, lesson plans, 911 audio, and LVMPD radio traffic.[4] In July 2011, Carrillo issued an overbroad request for production asking for numerous documents, including an internal affairs report:

> **REQUEST NO. 4:**
>
> The entire liability insurance, risk department, *internal affairs*, or any other administrative claims file related to the occurrence.

In response, 15-months ago LVMPD asserted its privilege to its IA file:

> **RESPONSE TO REQUEST NO. 4**
>
> Objection. The Request is overbroad, vague, ambiguous and seeks confidential information…[5]

Now, three months after discovery closed, Carrillo seeks to delay this case to obtain confidential and private documents. Carrillo had more than a year to challenge LVMPD's right to protect its internal affairs file. But Carrillo failed to do so.

---

[3] See Exhibit A.

[4] LVMPD's Second Supplemental Disclosures, attached as **Exhibit B**.

[5] LVMPD's Answers to Requests for Production, attached as **Exhibit C**.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

C. THIS COURT REJECTED CARRILLO'S REQUEST FOR ADDITIONAL DISCOVERY.

On September 14, 2012, Carrillo came before this Court requesting additional discovery. The Court granted in part Carrillo's *Fifth Motion* to extend discovery:[6]

> The Court grants the parties until **December 28, 2012** to complete discovery only as to the deposition of Officer Carpenter, the deposition of the Person Most Knowledgeable at the Las Vegas Metropolitan Police Department and Defendants' three expert witnesses.[7]

Carrillo left the hearing and expressly violated the Court's Order by sending a Notice of Deposition for seven LVMPD employees.[8] But Carrillo *never* subpoenaed any of the officers.[9]

LVMPD's counsel informed Carrillo of the deficiencies in the notices of depositions and indicated the officers would not appear absent a subpoena.[10] Carrillo *never* attempted to cure the deficiencies by subpoenaing the LVMPD employees. Instead, Carrillo asserted there was no such requirement:

> Please be advised, there is no requirement under Federal Rule of Civil Procedure 30(b)(1) that we subpoena witnesses that are employees of an organizational party-opponent such as Metro.[11]

Carrillo's counsel added that the requirement a subpoena be served on an employee is ridiculous:

> Your statement that a subpoena must "be served upon the non-party witnesses, even if they are employees of a party" is non-sensical and without any legal support whatsoever. Respectfully, it is not my job to educate you on the law…[12]

---

[6] Order regarding Fifth Motion to Extend Discovery Deadlines, attached as **Exhibit D**.

[7] Id. (emphasis in original).

[8] See Deposition Notices attached as **Exhibit E**.

[9] Also, Carrillo provided less than only 8 business days to prepare for the depositions. Equally troubling, Carrillo scheduled depositions in Las Vegas when all parties were already scheduled to have a deposition in Victorville, CA. Moreover, the other depositions were scheduled to conflict with other previously scheduled depositions in the case. See Exhibit D and Deposition Notice of LVMPD PMK and Deposition Notice of Thomas Carroll, attached as **Exhibit F**.

[10] September 21, 2012 Correspondence, attached as **Exhibit G**.

[11] September 22, 2012 Email from Paul Padda, attached as **Exhibit H**.

[12] Id.

Again, Carrillo did nothing to cure the deficiency. Rather, Carrillo waited three months to file a motion that will again delay the resolution of this case.

III. LEGAL ARGUMENT.

Carrillo's 15-month delay warrants denial of the motion to compel.[13] Carrillo's motion must also be denied on the merits. First, Carrillo failed to subpoena the LVMPD employees for a deposition. Without a subpoena, the employees are not compelled to attend a deposition. And second, LVMPD's Internal Affairs and Aron Carpenter's personnel file are confidential. Thus, Carrillo's motion must be denied.

A. CARRILLO CANNOT COMPEL EMPLOYEES TO ATTEND A DEPOSITION WHERE A SUBPOENA WAS NOT ISSUED.

The LVMPD employees were never subpoenaed to attend a deposition. It is fundamental in civil practice that a nonparty deponent can only be compelled to attend a deposition by subpoena.[14] Even a corporate defendant's employees must be subpoenaed *unless* the employee is an officer, director or managing agent.[15] The plaintiff has "the burden of providing enough evidence to show that there is at least a close question whether [the LVMPD employees are] managing agents."[16] Importantly, an individual is not a managing agent solely because of his or her title.[17]

To determine whether an employee is a managing agent, courts consider whether the individual (1) is invested with power to exercise his discretion and judgment in dealing with corporate matters; (2) can be depended upon to carry out employer's direction to give the required testimony, and (3) has an alignment of interests with the corporation rather than one of

---

[13] Discovery ended on September 26, 2012 with respect to all issues excepted a limited five depositions.

[14] See FRCP 30(a)(1) ("The deponent's attendance may be compelled by subpoena under Rule 45."); see also FRCP 45(a)(1)(A); Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385 (E.D. Pa. 1991).

[15] C. Wright & A. Miller, Federal Practice & Procedure §§ 2107, 2112 (1970); Trans Pacific Ins. Co., 136 F.R.D. at 392; Finley v. Count of Martin, 2009 WL 3320263, *1 (N.D. Cal. Oct. 13, 2009)

[16] Finley, 2009 WL 3320263 at *1; General Tire v. Broad Elm Auto Ctrs., 1997 WL 929823 (W.D.N.Y. Apr. 18, 1997).

[17] Id. at *2.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

the other parties.[18] In Finley, the Court held that the title of "nurse manager" was insufficient to find that the corporate employee was a "managing agent."[19] The court concluded the plaintiff failed to meet her burden in establishing the individual as a managing agent. Although the employee was a relevant witness, she could only be compelled to testify at a deposition by subpoena.[20] But there was nothing barring plaintiff from subpoenaing the witness to provide testimony at trial.[21]

Carrillo *never* subpoenaed the employees. Instead, Carrillo's counsel claimed there was no requirement to subpoena employees and the need to subpoena an employee is simply non-sensical.[22] Carrillo now asks this Court set aside the subpoena requirement. But the law requires a subpoena to be issued or for Carrillo to establish the employees as managing agents. Carrillo *never* contended that the employees were managing agents of LVMPD or offer evidence establishing the employees as managing agents—a burden that rests squarely on plaintiff's shoulders.[23] Simply, Carrillo only argues that a subpoena is not required to accompany a notice of deposition.[24] But the law is clearly established—a deponent is not required to attend a deposition if there was never a subpoena issued.[25]

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

---

[18] Philadelphia Indem. Ins. Co. v. Federal Ins. Co., 215 F.R.D. 492 (E.D. Pa. 2003).

[19] Id.

[20] See id.

[21] Id.

[22] Exhibit H.

[23] Carrillo only stated, without support, that the individuals were in managerial/supervisory roles. As outlined above, a title (such as "nurse manager" in Finley) is insufficient to establish that the individual is a managing agent. Finley, 2009 WL 3320263 at *2. Nowhere else does Carrillo even discuss that the individuals are "managing agents."

[24] Motion to Compel (Docket No. 84)

[25] CF & I Steel Corp. v. Mitsui & Co. (U.S.A.), Inc., 713 F.2d 494, 496 (9th Cir. 1983); see FRCP 30(a)(1) ("The deponent's attendance may be compelled by subpoena under Rule 45."); see also FRCP 45(a)(1)(A); Trans Pacific Ins. Co. v. Trans-Pacific Ins. Co., 136 F.R.D. 385 (E.D. Pa. 1991).

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Carrillo's request for additional depositions of LVMPD employees also violates this Court's September 14, 2012 Order and FRCP 30(h)(1)'s "reasonable notice" provision. The Court Order indicated that discovery was limited to five specific depositions—none of which included Redfairn, Toney or Hardy. Instead, Carrillo left the hearing and attempted to notice up the depositions in violation of Court Order and FRCP 30(b)(1)'s requirement that a party provide "reasonable written notice" to every other party. LVMPD first received written notice of the depositions on Monday, September 17, 2012, when business opened. The deposition notices provide LVMPD seven, eight and nine days notice for the various depositions. Moreover, the depositions were noticed for days which other depositions were already scheduled.[26] It is impossible for LVMPD to be at two places at once. Instead, Carrillo noticed the depositions acknowledging that there was not sufficient time as Carrillo immediately inquired of LVMPD about moving the depositions out past the discovery deadline.[27]

Simply, not only did Carrillo fail to subpoena the witnesses, but Carrillo also failed to provide reasonable written notice to the other parties. The day the depositions were scheduled for could not have gone forward based upon previously and properly noticed depositions. Thus, LVMPD respectfully requests this Court to deny Carrillo's motion to compel the depositions of LVMPD employees.

B. LVMPD'S IA FILE AND CARPENTER'S PERSONNEL FILE ARE PRIVILEGED AND CONFIDENTIAL.

1. LVMPD's IA File Must Remain Confidential.

It is imperative that LVMPD's IA file remain privileged and confidential. In extending a privilege to internal affairs documents, courts have struck a delicate balance between confidentiality of government information and the need for litigants to prosecute their action.[28] The central factor considered is "the degree to which governmental self-evaluation and

---

[26] See Exhibit D and F.

[27] See September 19, 2012 email from Tarquin Black, attached as **Exhibit I**.

[28] Segura, 116 F.R.D. at, 45.

consequent program improvement will be chilled by disclosure."[29] In striking this balance, government self-evaluation is chilled when the findings, comments and recommendations of its internal affairs are not protected.[30] Regarding other items in an internal affairs file, courts have considered the following ten factors:[31]

> (1) The extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) The impact on persons who have given information of having their identifies disclosed; (3) The degree to which government self-evaluation and consequent program improvement will be chilled by disclosure; (4) Whether the information sought is factual data or evaluated; (5) Whether the party seeking discovery is an actual or potential defendant in a criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) Whether the police investigation has been completed; (7) Whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) Whether the defendant suit is non-frivolous and brought in good faith; (9) Whether the information sought is available through other discovery or from other sources; and (10) The importance of the information sought to the plaintiff's case.

These facts weigh in favor of maintaining the confidentiality of LVMPD's IA file as LVMPD disclosed the factual basis for its internal investigation.

LVMPD asserted a narrow privilege over limited documents critical to its internal affairs investigation. Importantly, LVMPD produced its 80-page Confidential Accident Investigation Report providing a detailed account of its investigation, which included identification of officers involved, a factual account of the incident, investigation into the speed of the vehicles, interviews with witnesses, photographs, diagrams of the police chase, toxicology reports, summaries of radio communication and all other factual information.[32] Additionally, LVMPD produced its policies, interview transcripts of various individuals and Aron Carpenter's training records.[33] Moreover, Carrillo has the transcript of all witnesses that testified during Aron Carpenter's criminal trial. LVMPD only asserted its narrow privilege over its Internal Affairs

---

[29] Id.

[30] Id.

[31] Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D.PA. 1973).

[32] See Exhibit A.

[33] See Exhibit B.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

findings, comments and recommendations related to the disciplinary proceedings initiated against Aron Carpenter and limited interviews.

The first two factors are inconsequential as LVMPD already disclosed the identity of all officers and witnesses involved. But the third factor—the degree to which government self-evaluation and consequent program improvement will be chilled by disclosure—weighs heavily in favor of non-disclosure. LVMPD must be free to evaluate the actions of its employees without fear that its investigation will later become part of court proceedings. To allow LVMPD's IA file to be become part of litigation would discourage internal department evaluations and discourage LVMPD from conducting internal investigations. Notably, LVMPD produced its *confidential* 80-page investigatory findings. But forcing LVMPD to produce its comments, findings and recommendations from its Internal Affairs investigation would have a chilling effect on the LVMPD's self-evaluation and self-improvement process.

The fourth factor—whether the information sought is factual data or evaluated—also weighs in favor of non-disclosure. LVMPD disclosed its factual data in its 80-page investigation report, witness statements and interview transcripts. Now, LVMPD seeks to protect its findings, comments and interviews related to disciplinary proceedings. To the extent Carrillo needed more information, she was able to depose any of the officers but chose not to. Thus, LVMPD has been more than forthcoming in disclosing the factual data surrounding its investigation.

The ninth and tenth factors—whether the information sought is available through other discovery or from other sources and the importance of the information sought to the plaintiff's case—also weigh heavily in favor of maintaining the IA file's confidentiality. LVMPD disclosed all officers' names in its initial disclosures, as well as its 80-page investigation supplement. Carrillo had ample time to depose the officers, but chose not to. Moreover, the factual information is not only available through deposing the witnesses, but also available, in the 80-page investigation supplement, prior disclosure of witness interviews, voluntary statements and the criminal trial transcript.

In striking the balance between confidentiality of government information and the need for litigants to prosecute their action, the balance weighs heavily in favor of maintaining the

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

confidentiality of the IA file. Carrillo *never* demonstrated how maintaining the privilege would prohibit her from prosecuting her case. Yet, it is imperative for LVMPD to maintain the confidentiality of its Internal Affairs Investigation. Thus, LVMPD respectfully requests the Court to deny Carrillo's motion to compel the IA file.

2. Aron Carpenter's Personnel Files are Confidential.

Aron Carpenter's personnel file is confidential. The Ninth Circuit recognizes the confidential nature of personnel files and requires a plaintiff to show how the discovery of the actual file is necessary.[34] Courts must then weigh the potential benefits of disclosure against the potential disadvantages.[35] If the latter is greater, the privilege bars discovery.[36] While employee files are not absolutely privileged, "the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquires necessary to this litigation and would impact disciplinary procedures within [LVMPD]."[37] Thus, focused discovery should appropriately be employed.[38]

Carrillo *never* demonstrated how receipt of Carpenter's entire personnel file is necessary during discovery. LVMPD provided focused discovery and produced Aron Carpenter's training records and revealed in interrogatories prior "collisions" Aron Carpenter was in.[39] LVMPD asserted a privilege as to limited documents, which included personnel information and various applications.[40] Instead of demonstrating how production of the actual file is necessary, Carrillo merely states that the personnel file is "central to the issues in this litigation" and "may be

---

[34] Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033, 1034 (9th Cir. 1990).

[35] Id. at 1033-34.

[36] Id.

[37] Id. at 1034.

[38] Id.

[39] Exhibit B; LVMPD's Answers to Interrogatories at Answer No. 7, attached as **Exhibit J**.

[40] See LVMPD's Privilege Log, attached as **Exhibit K**.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

relevant to issues of credibility or motive."[41] Noticeably absent is argument regarding the necessity of the file. Contrary to the self-serving statement, the Ninth Circuit rejected Carrillo's request for a general search of Carpenter's personnel file. Such searches may reach well beyond legitimate inquires. Thus, LVMPD respectfully requests this Court to hold Aron Carpenter's personnel file confidential and privileged.

IV. CONCLUSION.

Carrillo's motion is nothing more than a delay tactic as the law sides with LVMPD. The law requires a subpoena to compel the depositions of LVMPD's employees—Carrillo *never* issued subpoenas. The law protects personnel files unless a party can demonstrate the need for the entire file—Carrillo *never* argued why she needs the entire personnel file when LVMPD provided the relevant documents. Lastly, the law allows LVMPD to assert a privilege over its IA file unless Carrillo's need for the information to prosecute her case outweighs the need to keep the documents confidential—Carrillo *never* demonstrated that she needed documents in the file to prosecute her case since LVMPD already produced its confidential 80-page Accident Investigation Supplement. Thus, Carrillo's untimely Motion to Compel should be denied.

DATED this 4th day of January, 2013.

MARQUIS AURBACH COFFING

By: _____
Craig R. Anderson, Esq.
Nevada Bar No. 6882
Joshua L. Benson, Esq.
Nevada Bar No. 10514
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for LVMPD

[41] Docket No. 84 at 9:15-20.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816